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NOTES.

CONSTITUTIONAL LAW — POLICE POWER — SLEEPING CAR BERTHS—Two recent Wisconsin statutes relating to the closing of upper berths in sleeping cars have been the subject of review by the Supreme Court of Wisconsin and by the United States Supreme Court. In 1907 an act was passed by the Legislature of Wisconsin providing that "whenever a person pays for the use of a double lower berth in a sleeping car, he shall have the right to direct whether the upper berth shall be opened or closed, unless the upper berth is actually occupied by some other person; and the proprietor of the car and the person in charge of it shall comply with such direction."¹ This act was declared unconstitutional in the same year

¹"An Act . . . Relating to the Health and Comfort of Occupants of Sleeping-Car Berths." Laws of 1907, chap. 266, § 1.

by the Supreme Court of the state,² chiefly, it seems, because the option of raising or lowering the upper berth was left to the occupant of the berth below.³ In order to rectify this defect, the legislature in 1911 passed another statute⁴ repealing the former act and making the closing of the upper berth under the circumstances above stated obligatory, instead of leaving to the choice of the passenger beneath.⁵ This second act was decided by the Supreme Court of Wisconsin to be constitutional;⁶ but the question was carried to the United States Supreme Court,⁷ where in a recent decision by a divided court, the state court was reversed and the act declared unconstitutional.

A statute of the nature of the one in question, if valid, would fall within the class of acts which are justified under the police power of the State. This power has been defined as "the power vested in the legislature by the Constitution, to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the commonwealth and of the subjects of the same."⁸ It is an exercise of this power to pass laws concerning the prevention of diseases, the adulteration of food, the sale of intoxicating liquors, the employment of children, and other subjects of almost unlimited variety. The police power lies within that great body of powers reserved to the states, and not conferred upon the federal government. The power, however, must not be pushed beyond constitutional limitations, the chief of which is to be found in the Fourteenth Amendment.

The police power is thus inherent in the state as a matter of self-preservation, and is to be exercised for the well being of

² *State v. Redmon*, 134 Wis. 89 (1907).

³ See opinion of Timlin, J., at p. 116: "I consider the act in question not a valid exercise of the police power, because committing to the discretion of the occupant of the lower berth the matter of compelling either the raising or lowering of the upper berth negatives the idea that the law is based upon considerations of public health, peace, morals, or safety."

⁴ Laws of 1911, chap. 272.

⁵ The act reads as follows: "Whenever a person shall engage and occupy a lower berth in a sleeping car, and the upper berth of the same section shall be neither engaged nor occupied, the upper berth shall not be let down, but shall remain closed until engaged or occupied."

⁶ *State v. Chicago, Mil. & St. P. R. R. Co.*, 152 Wis. 341 (1913).

⁷ *Chicago, Mil. & St. P. R. R. Co. v. State of Wisconsin*, 35 Sup. Ct. 869 (1915).

⁸ *Shaw, C. J.*, in *Com. v. Alger*, 61 Mass. 53 (1851), at p. 85. A concise definition is given by Scott, J., in *Lake View v. Rose Hill Cemetery Co.*, 70 Ill. 191 (1873), at p. 194: "The police power of the State is co-extensive with self-protection, and is not inaptly termed 'the law of overruling necessity.' It is that inherent and plenary power in the State which enables it to prohibit all things hurtful to the comfort, safety, and welfare of society."

society at large. Where the interest of the individual conflicts with the interest of the general public, the latter must govern. This frequently raises a difficult question as to whether the interest of the public really requires, in the particular case, that the interest of the individual be submerged. Is the proposed legislation an actual benefit to the public? Does it benefit society as a whole, or only a special class? Is it a sufficient benefit to justify the concomitant injury to the individual, or is it too oppressive upon him in proportion to its advantages? Is it a necessity or merely a convenience? These are some of the questions that must be considered in determining whether a measure is a permissible exercise of the police power, or an unwarrantable invasion of private right.

In the case under discussion, at the very outset there was some difference of opinion as to whether it is an advantage to the occupant of a lower berth in a sleeping-car that the upper berth be closed. The trial court found: "The closing of the upper berth will be a convenience to the person occupying the berth below." In the Supreme Court of Wisconsin, Mr. Justice Siebecker said, "In the light of such common knowledge, the evidence in the case tends to show that the effects of this regulation do contribute to the comfort and convenience of the traveling public and thereby contribute to promote their health and general welfare." But in the United States Supreme Court Mr. Justice Lamar remarked, "It is a matter of common knowledge that to let down the upper berth during the night⁹ would necessarily be an intrusion upon the privacy of those occupying lower berths. For the glare of the lights and the noise of lowering the upper berth would disturb any except the soundest sleepers."

Assuming, however, that the finding of the trial court was correct, the question arises whether the act benefits the public generally or only a particular class.¹⁰ It is true that not everyone has occasion to travel in sleeping cars; but it seems clear that the act in its terms is general in its application, and that anyone of the public may at will place himself within its purview.

But though the act may be beneficial, and though it may apply to the general public, there remains this question: Is the benefit to the public such as to justify the interference with the privileges of the railroad company? In order to render a police measure constitutional the change to be effected need not be absolutely essential to the welfare of society; it is sufficient that a convenience to the pub-

⁹ *I.e.*, in the event of its being engaged during the night.

¹⁰ See *Lawton v. State*, 152 U. S. 133 (1894), at p. 137: "To justify the State in thus imposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals."

lic will result.¹¹ The statute in question undoubtedly would interfere with the railroad company's freedom to manage its own affairs as it pleases; but the company has no legal right to such freedom, and there are many other statutes which so interfere, and which have been held to be constitutional.¹² Therefore the mere fact that the statute abridges the company's liberties does not of itself make it objectionable. But there is a general limitation upon the police power that its exercise must be reasonable, and not arbitrary or capricious.¹³ In the field of reasonableness, however, personal opinion is so large an element that unanimity in many cases is impossible. Thus the decision as to whether or not the statute in question unreasonably curtails the power of the railroad to manage its own business may very likely be influenced by remote considerations.

The principal ground assigned for declaring the act unconstitutional appears to be that it is a taking of property without due process of law. The carrier has a right to charge for the use of the space occupied by the upper berth, and that right is the carrier's property. The Wisconsin court, in discussing the point, declared that the act did not deprive the company of the use of the berth, but merely regulated the manner of such use. The United States Supreme Court does not treat this consideration fully, and draws the conclusion, without giving any definite reason, that the statute takes the carrier's property without compensation. This, it is submitted, is difficult to comprehend. The company is not prohibited from selling the space of the upper berth, or from allowing anyone to occupy it; it is merely required to keep the berth closed when neither engaged nor occupied. It is to be regretted that the Court failed to state more clearly its reasons.

The decision no doubt will act as a check upon what might be regarded as an unreasonable extension of governmental paternalism. It may or may not be proper; but the reasoning employed by the court does not appear convincing. Unfortunately neither of the dissenting Justices wrote an opinion.¹⁴ Moreover these two cases¹⁵ are apparently the only ones in which the validity of such a statute as the one under discussion has been passed upon by the courts.

E. E.

¹¹ Harlan, J., in *Lake Shore & Mich. S. Rwy. Co. v. Ohio*, 173 U. S. 285 (1899), at p. 300: "The power of the State by appropriate legislation to provide for the public convenience stands upon the same ground precisely as its power by appropriate legislation to protect the public health, the public morals or the public safety." The same doctrine was emphatically reaffirmed in *Chicago, Bur. & Q. Rwy. Co. v. People*, 200 U. S. 561, 592 (1906).

¹² *E.g.*, an act regulating the speed of trains, *Mobile & O. R. Co. v. State*, 51 Miss. 137 (1875); an act requiring depots at certain places, *State v. Kansas City, etc., Rwy. Co.*, 32 Fed. 722 (1887); an act prohibiting stoves in cars, *N. Y., N. H. & H. Rwy. Co. v. New York*, 165 U. S. 628 (1897).

¹³ *State v. Fairchild*, 224 U. S. 510 (1911); *Northern Pac. Rwy. Co. v. State*, 236 U. S. 585 (1914).

¹⁴ Mr. Justice Holmes and Mr. Justice McKenna dissented.

¹⁵ *State v. Redmon*, *supra*, note 2, and *State v. Chicago, Mil. & St. P. R. R. Co.*, *supra*, notes 6 and 7.